THE PACIFIC REVIEW

JUNE 1920

Published Quarterly by the

UNIVERSITY OF WASHINGTON

$3.00 a year 75 cents a copy

LINCOLN AND CIVIL LIBERTY

By Edward McMahon

The four great elements that distinguished liberty from despotism are habeas corpus, trial by jury, free speech, and free press. All that Anglo-Saxon blood has gained in the battles and struggles for self-government extending over a number of centuries is summed up in these four things. So fundamental to the welfare of a free people have they been held that they are enshrined in the Constitution of the United States and in the fundamental laws of the forty-odd commonwealths of the Union. They have been impressed upon the minds of the youth of the country as the landmarks of Constitutional freedom and as evidence of the superior self-governing genius of English speaking peoples. And yet in every crisis of importance there is an impatient tendency to brush them aside and ignore them as impediments to progress.

When Lincoln took his oath of office on March 4th, 1861, seven states had passed ordinances of secession and it was considered probable that other states were about to pursue a similar course. Should Maryland and Virginia secede, the District of Columbia which lay between them would be surrounded by hostile territory and cut off from communication with the North. The action of Maryland was of especial importance, for in Baltimore centred the three great railway routes by which loyal troops were to reach the capital. The people of Maryland were divided and feeling ran high. Troops on their way to Washington in response to the President's call of April 15, were attacked by a mob in Baltimore. Many citizens of Maryland who did not believe in secession were outspoken in their insistence that troops should not be allowed to pass through the state on their way to coerce the South. Further possibilities of danger were indicated when the

governor called the Legislature to meet in special session, on April 26. Some of the members were known to be sympathetic with the Secessionists, but would the state attempt to secede? Lincoln after consultation with some of his cabinet decided not to risk this possibility and he instructed General Scott to watch the situation, if necessary to use extreme measures and gave him power to suspend the privilege of the writ of habeas corpus anywhere in the state. Acting as seemed wise in the case a number of arrests were made and among those arrested was John Merryman, a citizen of Maryland, who was charged with holding a commission as lieutenant in a company avowing as its purpose hostility against the United States government, with being in communication with the rebels, and with other acts of treason. Merryman was arrested in the middle of the night by the military and confined in Fort McHenry. He thereupon applied to Chief Justice Taney for a writ of habeas corpus directing General Cadwalader to produce him in court and claimed that he was arrested and confined contrary to the Constitution and laws of the United States. Taney issued the writ but the Commandant of Fort McHenry sent his regrets saying that Merryman was charged with Acts of Treason, that the arresting officer had acted under the authority of the President of the United States, and had been authorized to suspend the privilege of the writ of habeas corpus. The Chief Justice then issued an attachment against the general for disobedience to the high writ of the court, but the United States Marshal was unable to enter the fort to serve it, and the court, realizing that any *posse comitatus* which the marshal might summon would be resisted by a superior force, expressed his inability to go further in that direction. He then wrote out his opinion and forwarded it to President Lincoln at the same time calling upon him to perform his constitutional duty of enforcing the laws.

Taney's understanding of the Constitution led him to the conclusion that the President had no power to suspend the

privilege of the writ of habeas corpus. The part of the Constitution dealing with habeas corpus is Section 9 of Article 1, which reads: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Who then may suspend it? Taney pointed out that the whole of Article 1 is devoted to the legislative department of the government. It begins by assigning legislative powers to a congress and after prescribing the manner and constitution of this Congress goes on to lay down its powers, and also the powers which it is forbidden to exercise, and concludes by giving Congress authority to carry into effect the "foregoing powers." Certain important rights, among them habeas corpus, are specifically mentioned in order that the general powers may not be supposed to cover them. An entirely different article of the constitution deals with the executive powers and Taney arrived at the conclusion from this fact that the President could not suspend the privilege of the writ nor authorize anyone else to do so. Referring to the claim that the President could suspend the writ, he remarked that he had listened to it with some surprise, "for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress." Taney further pointed out that the arrest of Merryman was not in conformity with other well known safeguards. The prisoner was not charged with any specific act constituting an offense against the laws of the United States but apparently was arrested on general charges of treason and rebellion, without proof, and without giving the names of witnesses or specifying the acts constituting the crimes. In other words Merryman was in custody upon vague and unsupported accusations, and the military officer refused to obey the writ upon the ground that the President had suspended it. Taney argued further that even if the privilege of the writ was suspended by Congress

and a party, not subject to the rules and articles of war, was afterwards arrested he could not be detained in prison or tried before a military tribunal because the 6th Article of the Constitution requires a speedy and impartial trial by a jury. And finally, the President could arrest only "in aid of the judicial authority and subject to its control," and all persons arrested by the military should be delivered over immediately to the civil authority to be dealt with according to the law, that the President was required to take care that the laws are enforced—not to enforce them himself—but to see that they *are enforced,* when "expounded and adjudged" by the courts.

Lincoln referred the question to Attorney-General Bates who promptly advised him that he had the power to arrest and hold in custody persons having or believed to have criminal intercourse with the insurgents and, in case of such arrest, was justified in refusing to obey a writ of habeas corpus issued by the courts. Reverting to the history of the writ in England, Bates pointed out that sovereignty was located there in a man or group of men, while the makers of our constitution, fearful of the executive, established a system of checks and balances by the creation of three co-ordinate departments; that no attempt was made to create an arbiter among them and that any attempt to that end would probably have failed if it had been made. Then harking back to the argument of James Madison in the days of the Virginia and the Kentucky Resolutions he urged that if the president is bound by the principles laid down by the judiciary, so is the judiciary bound by the principles laid down by the president, and that the system is one that flatly contradicts itself. "We have," he said, "three of these co-ordinate departments. Now, if we allow one of the three to determine the extent of its powers, and also the extent of the powers of the other two, that one can control the whole government, and has in fact achieved the sovereignty." Coming down to the controversy in issue, Bates held that it was the duty of the president *to enforce* the

laws, that in emergencies requiring the use of the army he can and must execute the law without recourse to the judiciary, that in such a crisis he has "the lawful discretionary power to arrest and hold in custody" persons against whom there is suspicion or probable cause, and that in the use of this force he must rely on his own judgment for the means and methods, of which he is the sole judge. Admitting that this is a terrible power and that it is liable to abuse, Bates observed that it was a necessary power nevertheless and must be lodged somewhere. If liability to abuse was a sufficient ground for denying it to the president, the argument applied with equal force to the other branches of the government. The power to suspend the writ he did not claim as a part of the President's ordinary powers in times of peace but as a necessary and logical power when there are combinations too powerful to be suppressed by the ordinary course of judicial proceedings.

It is barely possible that there was some disposition on the part of leading Republicans to pay little attention to Taney's constitutional views because of his Dred Scott Decision which logically outlawed the Republican party, but Taney's views on the suspension of the writ were widely shared by lawyers generally. B. R. Curtis declared, "If he [Taney] had never done anything else that was high, heroic and important, his noble vindication of the writ of habeas corpus and of the dignity and authority of his office, against a rash minister of state, who, in the pride of fancied executive power, came near to the commission of a great crime, will command the admiration and gratitude of every lover of constitutional liberty, so long as our institutions shall endure."

Lincoln asked Reverdy Johnson to write an opinion on the points at issue and Johnson did so, supporting Bates' contentions on every point. Trumbull, however, notwithstanding his support of the administration, was historically correct when he said, "The better opinion * * * among judges

and lawyers and constitutional commentators, surely is that the writ of habeas corpus was never intended by the Constitution to be suspended except in pursuance of an act of Congress. Judges have so stated, commentators have so written and not a commentator can be found who has written on the Constitution before this rebellion, who ever disputed that proposition."

Lincoln, however, suspended the writ whenever and wherever he or his subordinates considered it necessary, and, when Congress was called in special session on July 4, 1861, he frankly stated that he considered it his duty to authorize the suspension. He admitted that his authority to do so had been questioned, and submitted that whether or not any legislation was necessary on this point, he would leave to the judgment of Congress. Congress failed to legislate on the question during the first and the second sessions of the 37th Congress although the matter was up for frequent discussion. The reasons for the non-action of Congress are not hard to find. The majority of the members believed that the power to suspend the writ was a congressional power but they hesitated to affirm it for fear of discrediting the administration. In the meantime arbitrary arrests went on.

It is curious that a government "dedicated to the proposition that all men are created equal" should be so unmindful of its citizens that thousands of men should be confined in military prisons without leaving so much as an adequate record of their numbers or the cause of their arrests. Yet such is the fact. Prof. Alexander Johnston stated the number as 38,000, but there are no records to prove or disprove his estimate. Rhodes has satisfied himself that there were "thousands" of them, but is careful not to specify the number of thousands. The charges upon which many were arrested were extremely vague and indefinite. We are informed that from a list of 161 held in confinement in Missouri in November, 1862, 60 were suspected of "aiding the enemy," 32 were charged with having used "treasonable language," 23 with

"general disloyalty"; and others were accused of "corresponding with the rebels," "giving information to the rebels" and "disloyal statements." The evidence varied in individual cases all the way from nothing but suspicion to substantial reasons for the arrest. General Scott on one occasion recommended the arrest of the police commissioners of Baltimore "to carry consternation into the ranks of our numerous enemies." General Dix reported to Seward that he had arrested two men on testimony vouched for by the United States Marshal but found on investigation that he had in custody "two of the most consistent and active union men in the neighborhood." Five days later he reported to the same authority that he had examined the papers in a particular case and suggested that the prisoner be held at least three weeks longer "until after the fall elections—say the tenth of November." During the early part of the war most of the arbitrary arrests were made under the direction of the Secretary of State, or by the military authorities, and most of the latter cases came under Seward's supervision just as if he had taken the original action. A large number of the arrests were made at night, or under circumstances that prevented attempts to obtain writs of habeas corpus. Very many mistakes were made and Seward, who had too many things to attend to, fell into the habit of waiting for political or personal pressure to be exerted before he examined the cases. When he concluded the case should be looked into he ordered an investigation. For this purpose he relied largely upon either Seth C. Hawley, the chief clerk of the New York Police Commission, Robert Murray, United States Marshal at New York, or Allan Pinkerton, head of the United States Secret Service, to make the investigation for him, and he was generally governed by their recommendations. All applications for legal examinations or discharge were ignored and if any prisoner was found to have engaged an attorney for the purpose of securing his release that fact was "held as an additional reason for continuing the

confinement of such a person." Finally there was so much complaint against Seward's management that Lincoln felt compelled to transfer this authority to the War Department in February, 1862. The orders for arrests are interesting documents. Two are given as samples of the whole.

[Telegram] "Washington, Sept. 14, 1861. United States Marshal: Arrest Leonard Sturtevant and send him to Fort Lafayette, N. Y., and deliver him into the custody of Col. Martin Burke. Wm. H. Seward."

[Telegram] "Department of State, Washington, Sept. 17, 1861. John A. Kennedy, Supt. of Police, New York. Your letter received. Arrest Charles W. Adams, secure his papers, and send him to Fort Lafayette. Wm. H. Seward."

These orders, "as arbitrary as the *Lettres-de-cachet* of Louis XIV," were signed by Seward, but Lincoln was responsible for them indirectly. When he transferred the authority to make these arrests to "the military authorities alone" he ordered "that all military or state prisoners held in military custody be released on their subscribing to a parole enjoining them to render no aid or comfort to the enemies in hostility to the United States." Many secured their release by signing a parole but not all. The interesting refusal of Francis and Joseph Flanders reads: "We have been guilty of no offense against the laws of our country, but have simply exercised our constitutional rights as free citizens in the open and manly expression of our opinions on public affairs. We have been placed here without any legal charges or indeed any charges whatever being made against us and upon no legal process, but upon the arbitrary and illegal order of the Hon. Wm. H. Seward, * * * and while we would cheerfully take the oath described by the Constitution of the United States because we are, and always have been, and always intend to be loyal to that instrument * * * we cannot consent to the oath required of us because * * * it commits us to the support of the government though it may be acting

in direct conflict with the constitution and deprives us of the right of freely discussing and by peaceful and constitutional methods, opposing its measures * * * a right sacred to freedom and which no American citizen should voluntarily surrender."

When jurisdiction over those arbitrarily arrested was transferred to the Department of War, no very radical changes were made. In view of the proposed change Seward ordered the transmission of all definite information regarding these prisoners. In some instances the reasons for the arrests were forthcoming but in very many instances no reasons could be given from the records. Stanton immediately appointed two commissioners, General Dix and Edwards Pierpont, to hear and determine these cases, and it was then that many of them were released on parole. A new department of the military service was then created to take charge of political arrests with J. B. Fry at its head as provost-marshal-general and with subordinates known as provost-marshals appointed in several states to act under the direction of the State executives in arresting disloyal persons. This system under Stanton's direction exercised control of those arbitrarily arrested during the remainder of the war.

As the campaign of 1862 began to take shape, vigorous and violent protests came from the congressmen and senators. These protests were made in the main by Democrats and Unionists from the border states though there were some influential Republicans who joined in the condemnation. On Sept. 24, 1862, Lincoln finding that disloyal persons were not adequately restrained by the ordinary processes of law from hindering the draft law and giving aid and comfort to the enemy in other ways, issued a proclamation subjecting to martial law and trial and punishment by court martial, or military commission, all rebels and insurgents "and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice" or affording aid and comfort

to the enemy, and suspending the writ of habeas corpus in respect to all such persons arrested or imprisoned or sentenced by any court martial or military commission. Military commissions had no legal existence at the time the President thus conferred jurisdiction on them and there was created as a result a complete judicial system outside the ordinary civil and criminal courts. In addition this executive decree created the new offenses of "discouraging enlistments" and "any disloyal practice" and suspended the writ of habeas corpus over the whole country for persons arrested on these charges. As a result of this proclamation Professor Parker, of the Harvard Law School, observed that the President was "not only a monarch, but that his is an absolute, irresponsible, uncontrollable government; a perfect military despotism." The arrests made under the authority of this proclamation were very numerous—no one knows how many—and resulted in no permanent good. The insolence and mistaken zeal of subordinates only increased the dissatisfaction. In November following the elections Stanton discharged practically all the political prisoners and this lent color to the charges of the Democrats that they were made "to suppress free discussion of political subjects."

The elections of 1862 were almost a "vote of want of confidence in the president." New York, Ohio, Pennsylvania, Illinois, Indiana and Wisconsin all had cast their electoral vote for Lincoln and now declared against the party in power. The agitation against arbitrary arrests was undoubtedly a factor in this reversal though how far it was a factor is hard to determine because the Emancipation Proclamation, the corruption in the War Department before Stanton became secretary, and the dissatisfaction with the progress of the war were all elements in the election.

The elections were, however, directly responsible for forcing Congress to attempt to clear up the situation created by arbitrary arrests. Heretofore the attempts in Congress to

limit arbitrary arrests were made mostly by Democrats and Border State Unionists but now the Republicans were impressed with the necessity for action. The House of Representatives passed two bills, one introduced by Stevens "to indemnify the President and other persons for suspending the privilege of the writ of habeas corpus and the acts done in pursuance thereof," and the other, to regulate arrests. The first bill was made necessary by the arrest in the spring of 1862 of Simon Cameron, late Secretary of War, for "trespass *vi et armis,* assault and battery, and false imprisonment." Secretary Welles had been exposed to similar reprisals and it was even feared that the President might suffer a greater humiliation.

In the Senate, Trumbull offered substitutes for both of the House bills and these substitutes were passed. The conference committee brought about a compromise bill which contained the ideas in both sets of bills. Collamer expressed very well the objection of many to any bill. He said Congress should not pass any bill in which the necessary implication was that the President's decision was incorrect. The President should not be asked to approve any such bill and thus "publish to the world that he had done that which he had no legal right to do."

The resulting Habeas Corpus Act of March 3, 1863, is in some respects a curious act. The phraseology of the first section does not deny the President's right to suspend the writ and it was unquestionably not the intention of its sponsors to deny the President's right to suspend. On the other hand Congress clearly asserted its right to take control of the suspension of the privilege of the writ. What had been done by the President was made legal and he was clearly given the power to continue to suspend the writ. On the other hand the Secretaries of State and of War were directed to furnish to the circuit and district courts the names of all persons now or hereafter held as prisoners of the United States by the

authority of the Secretaries or of the President. And it was further provided that whenever a grand jury has terminated its sessions in any of these courts without finding an indictment against the persons named on these lists the judge shall order their release and every United States officer shall obey the orders of the court. In pursuance of this act, Stanton ordered lists of prisoners prepared but Judge-Advocate-General Holt complied only in part; giving as his reasons for not complying fully with the act, the pressure of other business, the extreme difficulty of construing the law, and other minor reasons. This is the only attempt so far as the record goes to comply with the law. No other lists were ever sent to any judge. Later the Senate noticing the failure to comply with the law called on Stanton to furnish information and his reply states that he had no records or reports of any political prisoners. This does not mean that there were no prisoners arbitrarily arrested, for he had continued his policy, without interruption, of trying men by Military Commissions, but it means that he had no records to give. On Sept. 14, 1863, the cabinet had under discussion the matter of soldiers, deserters, and drafted men being released from custody on writs of habeas corpus and it was agreed that this should be stopped or the army would disappear. The next day a proposed order of the President was discussed and Chase was astonished to find that he was the only one present at the cabinet meeting who seemed to have read the Habeas Corpus Act or to be familiar with it. Chase argued for a suspension of the writ and the prosecution of those who interfered with the organization of the army *under the Act of Congress*. Lincoln followed Chase's advise in part and proclaimed a general suspension of the writ for those who were arrested and held as prisoners of war, spies, or aiders and abettors of the enemy. "Aiders and abettors" was in practice given a very loose interpretation and might include those who falsely exalted "the motives, character and capacity of armed traitors" or who overrated the

successes of the enemy or underrated our own or those who made false "complaints against the officers of government" or "inflamed party spirit among ourselves."

It will be seen at once that the element of judgment may have entered into the make-up of some of these offenses, and the boundary line between legitimate political opposition to the administration and crime became very hazy. In 1865 Lincoln twice refused to obey the requirements of the second section of the act and forbade the officers having the custody of prisoners to surrender them to the Supreme Court of the District of Columbia, and in both cases the courts held that the Habeas Corpus Act had not restricted his power to suspend. No detailed investigation of executive violations of the act had been made but the violations came up for sharp and sweeping condemnation in Congress repeatedly and they were made not only by political enemies but by such staunch friends of the administration as Lyman Trumbull, Reverdy Johnson and James A. Garfield. Senator Salisbury, of Delaware, in a scathing arraignment of arbitrary arrests pointed out that in one neighborhood in Delaware "almost one-third" of the inhabitants had been arrested "not because they ever resisted the execution of any federal law, but because they were politically obnoxious to the party in power." The most famous case of arbitrary arrest during the civil war probably was that of C. L. Vallandigham, a congressman from Ohio. Vallandigham was a very able lawyer, an unsparing critic of the administration who in his speeches came as near giving aid and comfort to the enemy "as any talk could that proceeded from a good lawyer who knew the law." He was arrested for a political speech delivered at Mt. Vernon, Ohio, tried and found guilty by a military commission and banished to the South. While it attracted a good deal of attention and came very near to making him Governor of Ohio, his case was not very different from hundreds of others except that Vallandigham was a prominent and eloquent congressman who could make him-

self heard while the hundreds of others suffered in comparative silence. From beginning to end law and justice were set aside in Vallandigham's case as in scores of others. Lincoln was deliberately violating a law of congress that he himself had signed and his argument against referring such cases to a jury on the ground that there is too often one man on the jury "more ready to hang the panel than hang the traitor" begs the whole question. To discard jury trial because the jury will not always convict "would obviously be subversive of personal liberty."

Lincoln's endorsement of Burnside who made the arrest places him in an unusual light. He wrote, "All the Cabinet regretted the necessity of arresting . . . Vallandigham; . . but being done, all were for seeing you through with it." The Vallandigham Case brought forward vigorous protests from a meeting of prominent citizens in Albany, New York, and from a committee of the Democratic State Convention of Ohio. These protests drew from Lincoln rather full statements of his views on arbitrary arrests. After discussing the constitutional provisions at some length he says, "But these provisions of the Constitution have no application to the case we have in hand, because the arrests complained of were not made for treason—that is, not for *the* treason defined in the Constitution . . . nor yet were they made to hold persons to answer for any capital or otherwise infamous crimes; nor were the proceedings following, in any constitutional or legal sense, 'criminal prosecutions'. The arrests were made on totally different grounds, and the proceedings following accorded with the grounds of the arrests." Contending that Vallandigham was discouraging enlistment and urging desertion, Lincoln asked, "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?" He closed his reply to the Ohio Democrats with an offer to revoke Vallandigham's punishment if the members of the committee would sign certain

propositions binding them to support the war and the means of prosecuting it. The committee replied that Vallandigham's arrest and punishment were legal and deserved, or illegal and undeserved, and that Lincoln had no right to make either of them depend upon any opinions or promises the committee might or might not support. They retaliated by pointing out that according to Lincoln's argument if a person were arbitrarily arrested and guilty of a real crime such as "the treason defined in the Constitution" the person would be surrounded by all the constitutional safeguards looking to his safety and security, but if arrested for a crime not recognized by the Constitution and laws no person was placed outside the pale of constitutional guarantees and imprisoned, tried by court martial, and subjected to punishment unknown to the law of the land. "In plainer terms, because the writ of habeas corpus may be suspended at time of invasion or insurrection, you infer that all other provisions of the Constitution having in view the protection of life, liberty, and property of the citizen, may be in like manner suspended."

In his reply to the Albany citizens, Lincoln held that not only were arrests permissible for acts that were not contrary to any law but that arrests might be made for offenses that could not be proved and even for "what probably would be done." Lincoln denied also that arbitrary arrests need be confined to the part of the country where rebellion actually exists. The Constitution makes no such distinction, he said, and such arrests "are constitutional wherever the public safety requires them; as well in places to which they may prevent the rebellion extending as in those where it may be already prevailing."

Rhodes' judgment of Lincoln's argument is that he "went as far towards proving a bad case as the nature of things will permit" but "he did not take the view of the broad statesman we may note in his papers on compensation to the border states and on the emancipation of the slaves."

Lincoln in his reply to the Albany and Ohio protestants "virtually appealed to the northern people to secure efficiency by setting him momentarily above all civil authority. He asked them, in substance, to interpret their Constitution by a show of hands. No thoughtful person can doubt the risks of such a method." Yet the great majority of the North, such was the confidence in Lincoln's honesty, were undoubtedly willing to endorse Lincoln's position.

The attempts of Vallandigham and others to get their cases before the Supreme Court failed during the war, but in 1866 the case of Milligan and others came before that tribunal for adjudication. Milligan, a citizen of Indiana, was found guilty by a military commission of conspiracy, affording aid and comfort to rebels, inciting insurrection, disloyal practices, and violation of the articles of war, and was sentenced to death.

His name was not furnished the judges of the circuit court as required by the Habeas Corpus Act and a writ of habeas corpus was applied for in May, 1865. The circuit court certified to a difference of opinion and the case went on appeal to the United States Supreme Court where a decision was arrived at April 3, 1866 and handed down December 17, 1866. Both sides were very ably represented at bar. The attorneys for the United States were Attorney-General Speed, Henry Stanberry (later Attorney-General), and Benjamin F. Butler. Milligan was represented by J. S. Black, (Ex-Attorney-General), James A. Garfield, D. D. Field, J. E. McDonald, A. L. Roache, and John R. Coffroth.

The decision of the court was a complete and absolute denial of Lincoln's contentions. It held that "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its

provisions can be suspended during any of the great exigencies of government. . . . The theory of necessity on which it is based is false: for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence. . . . " Military commissions the court decided were no part of the judicial system and could not be justified on the mandate of the President. The laws and usages of war "can never be applied to citizens in states which have upheld the authority of the government, and when the courts are open and their process unobstructed." The courts of Indiana have been open and "no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in no wise connected with the military service. Congress could grant no such power, and . . . has never been provoked by the state of the country to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior. . . . Another guarantee of freedom was broken when Milligan was denied a trial by jury. . . . until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning this right . . . is preserved to everyone accused of crime" who is not attached to the military service. "This privilege is a vital principle, underlying the whole administration of criminal practice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity." The court noted that when peace prevailed throughout the country there was no difficulty in preserving the safeguards of liberty, "but if society is disturbed by civil commotion—if the passions of men are aroused, and the restraints of law are weakened, if not disregarded—these safeguards need, and

should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws."

To say that the decision of the court was satisfactory to all would not be true. There were many in the Republican party who repudiated the Dred Scott decision when it was made and who now repudiated the decision in the Milligan case. Stevens said it "was not as infamous as the Dred Scott decision" but it was "far more dangerous in its operation upon the lives and liberties of the loyal men of the country." The logical conclusions flowing from the Milligan decision made it evident that the trial and execution of Lincoln's assassins were, in the eyes of the law, no better than lynchings; and that the hundreds of others tried and punished by military courts and commissions were tried by machinery no more legal than that used in the Milligan case.

Within a few months after the court rendered its opinion Congress in passing the reconstruction acts deliberately established throughout the South the precise military tribunes which had been denounced so unsparingly by the Supreme Court. The defiance was so patent that able lawyers hastened to bring cases before the court in the belief that these new laws would be nullified, but the court took refuge behind the bewildering technicalities which were welcomed to enable it to evade jurisdiction.—That, however, is another story.